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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. ENRIQUE MONTIJO, Petitioner.	2 CA-CR 2011-0114-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20030655

Honorable Terry L. Chandler, Judge

REVIEW GRANTED; RELIEF DENIED

Enrique Montijo — Florence
In Propria Persona

B R A M M E R, Judge.

¶1 Enrique Montijo seeks review of the trial court's denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. After entering a plea agreement, Montijo was convicted in December 2003 of armed robbery, a dangerous-nature offense. The court sentenced him to an aggravated, twelve-year prison term, based on the following aggravating circumstances: "The defendant is violent, dangerous, and

has anger issues; he had an accomplice; [the offense] was done for pecuniary gain, and it had a profound effect on the victim."

¶2 In January 2010, Montijo filed a notice and petition for post-conviction relief in which he alleged he had been sentenced in violation of his Fifth and Sixth Amendment rights, pursuant to the rules announced in *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Apparently relying on *State v. Price*, 217 Ariz. 182, ¶¶ 27-28, 171 P.3d 1223, 1228-29 (2007) (Hurwitz, J., concurring), Montijo also argued his aggravated sentence was illegal because it was not based on aggravating circumstances specifically enumerated in former A.R.S. § 13-702(C), 2002 Ariz. Sess. Laws, ch. 267, § 3, but on circumstances that fell within the "catch-all" provision of that statute.[1] In addition, in a supplemental petition filed by appointed counsel, Montijo claimed his counsel had rendered ineffective assistance in failing to argue at sentencing that jury findings were required before an aggravated sentence could be imposed, in anticipation of the Supreme Court's ruling in *Blakely*, and in failing to advise Montijo to file a timely Rule 32 petition on the same issue.[2]

¶3 The trial court denied relief in a detailed ruling, first correctly concluding that Montijo's post-conviction relief proceeding, filed more than six years after he was

[1]When Montijo committed his offense, former § 13-702(C)(19) provided that circumstances supporting an aggravated sentence included, in addition to specifically enumerated factors, "[a]ny other factor that the court deems appropriate to the ends of justice." 2002 Ariz. Sess. Laws, ch. 267, § 3. Montijo is mistaken that all of the aggravating circumstances found by the court fell within this "catch-all" provision. At the time of his offense, the relevant statutes specifically provided for the imposition of an aggravated sentence based on the "[p]resence of an accomplice." *Id.*; *see also* former A.R.S. § 13-604(I), 1999 Ariz. Sess. Laws, ch. 261, § 5; *cf. State v. Schmidt*, 220 Ariz. 563, ¶ 11, 208 P.3d 214, 217 (2009) (aggravated sentence permissible when single enumerated aggravator properly found).

[2]*Blakely* was decided on June 24, 2004. 542 U.S. at 296.

sentenced, was untimely. The court then correctly found Montijo's claim of error based on *Apprendi* and his allegation of ineffective assistance of counsel were not based on grounds for relief available to a defendant whose petition is untimely. *See* Ariz. R. Crim. P. 32.4(a). Relying on *State v. Febles*, 210 Ariz. 589, ¶ 7, 115 P.3d 629, 632 (App. 2005), the court further concluded Montijo's claim of *Blakely* error was foreclosed because his case was final before *Blakely* was decided.[3] Finally, with respect to Montijo's reference to *Price*, the court concluded, "[A]s discussed above, *Blakely* does not retroactively apply to [Montijo]'s case and therefore Arizona cases that were decided after [his] case became final[,] and apply *Apprendi* in light of *Blakely*, cannot be considered in analyzing whether [his] sentencing was consistent with *Apprendi*."

¶4 On review, Montijo appears to argue the trial court (1) ignored his reliance on *Apprendi*, (2) failed to rule upon his claim that the use of catch-all aggravators deprived him of notice of a "functional element" of his offense, and (3) failed to address ineffective assistance of counsel in the context of those two claims. We review a trial court's summary denial of post-conviction relief for an abuse of discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find no abuse of discretion here.

¶5 The trial court specifically and correctly found a claim based on *Apprendi* could not be brought in an untimely petition, because that decision had been rendered years before Montijo's sentence and could have been raised in a timely proceeding. Although the court did not expressly address Montijo's allegation that he was deprived of due process because "catch-all" aggravators were used in imposing his sentence, the

[3]The trial court further noted that "if [it] were to examine [Montijo's ineffective assistance of counsel] claim on the merits," that claim also would be foreclosed by *Febles*. *See Febles*, 210 Ariz. 589, ¶ 24, 115 P.3d at 637.

court did address the claim when it concluded *Price* and other post-*Blakely* cases were inapplicable to Montijo's 2003 sentence. We agree.

¶6 In *Price*, our supreme court relied on *Blakely* and *Apprendi* to hold a trial court had erred in imposing an aggravated sentence based on its own finding that a defendant was "a danger to the community." 217 Ariz. 182, ¶¶ 14, 16, 21, 171 P.3d at 1226-28. In a concurring opinion that since has been adopted by our supreme court, *see State v. Schmidt*, 220 Ariz. 563, ¶¶ 9-11, 208 P.3d 214, 217 (2009), Justice Hurwitz questioned whether, consistent with the due process requirement that advance notice be given of conduct that constitutes the elements of a crime, a court may "constitutionally employ only an unenumerated aggravating circumstance under the 'catch-all' provision in former A.R.S. § 13-702(C)(18) (2001) to impose a sentence in excess of the statutory presumptive term." *Price*, 217 Ariz. 182, ¶¶ 24, 27-29, 171 P.3d at 1228-29 (Hurwitz, J., concurring). But our supreme court's decision in *Schmidt* is premised on *Blakely* and *Apprendi*, *see Schmidt*, 220 Ariz. 563, ¶ 6, 208 P.3d at 216, and we agree with the trial court that the benefits of those decisions are unavailable to a defendant whose conviction was final before *Blakely* was decided. If *Blakely* is not applicable retroactively to convictions that, like Montijo's, already had become final, as an Arizona court has held, *Febles*, 210 Ariz. 589, ¶ 17, 115 P.3d at 635, it would be anomalous to conclude that *Schmidt*, as *Blakely*'s progeny, would apply retroactively to Montijo's sentence.

¶7 Finally, although Montijo complains that the trial court "did not rule upon the ineffective assistance of counsel claim(s) as they pertained to *Apprendi* or due process violations," Montijo did not raise these allegations in his petition or amended petition below, and we will not consider these additional claims on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (reviewing court does not consider

issues neither presented to nor decided by trial court); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain "[t]he issues which were decided by the trial court . . . which the defendant wishes to present . . . for review").

¶8 The trial court clearly identified and resolved the issues Montijo raised in his petition for post-conviction relief, in a manner that will be understood by any court in the future, and did not abuse its discretion in doing so. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Because the court's findings and conclusions are supported by the record before us, we see no purpose in rehashing the court's order here and, instead, we adopt it. *See id.*

¶9 Accordingly, we grant review but deny relief.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge